

Present:
Mr. Justice Mohammad Marzi-ul-Huq
and
Mr. Justice Md. Ruhul Quddus

Criminal Misc. Case No.267 of 2005

Md. Amir Hossain

... Petitioner

-Versus-

The State

... Opposite Party

No one appears for the petitioner

Mr. Khizir Hayat, D.A.G.

... for the opposite party

Judgment on 10.6.2012

Md. Ruhul Quddus, J:

This Rule at the instance of the convict-petitioner was issued on an application under section 561A of the Code of Criminal Procedure for quashment of judgment and order dated 26.4.1999 passed by the Metropolitan Special Tribunal No.9, Dhaka in Metropolitan Special Tribunal Case No.1135 of 1999 convicting the petitioner under section 25 B (2) of the Special Powers Act, 1974 and sentencing him thereunder to suffer rigorous imprisonment for two years with a fine of Taka 2000/-, in default to suffer rigorous imprisonment for three months more. By the same judgment, the Tribunal convicted co-accused Sunil Nandi alias Babu under the same penal section and sentenced him to suffer rigorous imprisonment for one year with a fine of Taka 1000/-, in default to suffer rigorous imprisonment for two months more

Informant Md. Akhter Hossain, a Sub-Inspector of Police produced the arrested petitioner and another to Cantonment Police Station, Dhaka on 2.11.1993 and lodged an *ejahar* alleging, *inter alia*, that he along with constables Ashraf Ali and Momtazuddin was on special duty on 2.11.1993. He received secret information that illegal foreign cigarettes were being sold in Rupsha General Store at Cantonment Super Market. He along with the constables rushed to the said shop at 13.45 hours and asked the petitioner Md. Amir Hossain (brother of the shop-owner) and an employee of the shop named Sunil Nandi alias Babu whether there were any illegal cigarettes. They replied affirmatively. On his instruction, they brought out eight cartoons and fifty packets of Benson and Hedges; four cartoons and thirty-seven packets of 555 cigarettes (made in England) from different places of the shop. As they had failed to show any documents against the cigarettes, the informant seized the same in presence of three local witnesses and arrested the petitioner and the employee.

The *ejahar* gave rise to Cantonment Police Station Case No.8 dated 2.11.1993. The informant himself had investigated the case and submitted charge sheet on 25.11.1993 against both the accused including the petitioner under section 156 (8) of the Customs Act read with section 25B of the Special Powers Act. Meanwhile the petitioner had obtained bail from the concerned Metropolitan Magistrate, but subsequently did not turn up to face the trial.

The case having been ready for trial was sent to the Senior Metropolitan Special Tribunal, Dhaka and was registered as Special Tribunal Case No.1135 of 1991. Subsequently it was sent to Metropolitan Special Tribunal No.16, Dhaka for hearing and disposal. Learned Judge of Tribunal No.16 framed charge under section 25B (2) of the Special Powers Act against the petitioner in absentia and against co-accused Sunil Nandi in his presence by order dated 6.4.1996 and proceeded with trial. In course of trial, the case was transferred once again to Metropolitan Special Tribunal No.9, Dhaka for further trial and disposal.

Prosecution examined five witnesses in support of its case, while the defense examined none. Among the prosecution witnesses P.Ws.1 and 3, Md. Ashraf Ali and Momtazuddin respectively were two constables of police and members of the raiding party. P.W.2 Md. Akter Hossain was the informant. He was P.W.5 as well and was examined separately in the capacity of Investigating Officer. P.W.4 Habibur Rahman was a local seizure list witness.

After conclusion of trial, learned Judge of the Tribunal found both the accused guilty and convicted them under section 25B (2) of the Special Powers Act and sentenced the petitioner thereunder to suffer rigorous imprisonment for two years with a fine of Taka 2000/-, in default to suffer rigorous imprisonment for three months more, while sentenced co-accused Sunil Nandi alias Babu to suffer rigorous imprisonment for one year with a fine of Taka 1000/-, in default to suffer

rigorous imprisonment for two months more by his judgment and order dated 26.4.1999.

The petitioner came to learn about the judgment and order of conviction and sentence, and surrendered before the Tribunal on 25.11.2004, wherefrom he was sent to jail. Thereafter he moved in this Court with the instant criminal miscellaneous case under section 561A of the Code for quashment of the judgment and order of conviction and sentence.

Mr. Khizir Hayat, learned Deputy Attorney General appearing for the State-respondent submits that the allegations of possessing huge number of illegal foreign cigarettes have been clearly proved against the petitioner and his accomplice Sunil Nandi. There is no illegality in the impugned judgment and order of conviction and sentence and as such there is no scope to interfere with the same by this Court in exercise of its inherent power under section 561A of the Code.

We have considered the submissions advanced by learned Deputy Attorney General and have gone through the evidence on record. The informant Md. Akhter Hossain (P.W.2) stated that while posted at Cantonment Police Station, he along with police constables Ashraf Ali and Momtazuddin was on emergency duty on 2.11.1993. He had received secret information that there were foreign cigarettes in Rupsha General Store at Holding No.30, Cantonment Super Market. They rushed to the shop at 13.45 hours, found the petitioner Md. Amir Hossain and an employee Sunil Nandi alias Babu there and asked them

whether there were any foreign cigarettes. They had confessed to have possessed the cigarettes, and on his instruction brought out eight cartoons and fifty packets of Benson and Hedges; four cartoons and thirty-seven packets of 555 cigarettes (made in England). He seized the cigarettes in presence of local witnesses on preparation of a seizure list. As the accused persons could not show any documents in support of their possession of the cigarettes, he arrested them and produced them to the police station along with the seized cigarettes. He proved the seizure list, *ejahar* and his signatures thereon and also proved the seized cigarettes those were produced before the Tribunal. In capacity of the Investigating Officer he deposed further as P.W.5 and stated that after recording the first information report, the Officer-in-charge assigned him to investigate the case. He visited the place of occurrence, prepared the sketch map with index and recorded statements of the witnesses under section 161 of the Code. He proved the sketch map, index and his signatures thereon, and also identified co-accused Sunil Nandi on dock.

P.Ws.1 and 3 Ashraf Ali and Momtazuddin respectively two police constables and members of the raiding party fully corroborated the informant (P.W.2) in terms of time, place, manner and other material particulars. P.W.4 Habibur Rahman, a local seizure list witness stated that he had signed on a blank paper and proved his signature on the seizure list. In cross-examination he stated that police did not threaten him to sign on blank paper.

In view of the evidence as discussed above, the allegations of keeping huge foreign cigarettes illegally under possession of the accused including the petitioner have been proved. P.W.4 though stated that he had signed on blank paper, admitted in cross-examination that police did not threaten him to do so. It is not believable that without any compelling circumstance, a person could sign on a blank paper. From the statement made in his cross-examination, it becomes clear that because of local influence, P.W.4 did not tell the truth. His evidence thus could not raise any doubt on the prosecution case.

The scope of quashment of a judgment and order of conviction under section 561A of the Code is very narrow and limited. In the present case there is no scope to say that the impugned judgment is based on no evidence or passed in total non-consideration of evidence or that the Tribunal had no jurisdiction to try the case or it was not properly constituted. Moreover, the petitioner had obtained bail from the Court of Chief Metropolitan Magistrate, Dhaka and thereafter did not turn up to the Tribunal to face the trial. Therefore, it also cannot be said that he was not aware of the case.

Only one point that strikes our mind is that admittedly the petitioner was not the owner of the shop. He was a brother of the owner, while co-accused Sunil Nandi alias Babu was an employee. Both of them were in knowledge of illegal storage of cigarettes in the shop of occurrence and both of them brought out those cigarettes from different places of the shop. Therefore, both of the accused stood on

same footing and the liability for committing the offence is equal against each of them. But the trying Judge without differentiating their liability and complicity in the alleged occurrence sentenced the petitioner to suffer more imprisonment and pay more fine than what was awarded upon co-accused Sunil Nandi. Under the circumstances we are of the view that justice would be met, if the sentence of the petitioner is reduced to equal with that of co-accused Sunil Nandi.

In the result, the Rule is discharged with alteration of sentence in the impugned judgment and order so far it relates to the petitioner. Accordingly the sentence awarded upon the petitioner Md. Amir Hossain is reduced to one year rigorous imprisonment with fine of Taka 1,000/= in default to suffer rigorous imprisonment for two months more. The impugned judgment and order of conviction and sentence dated 26.4.1999 passed by the Metropolitan Special Tribunal No.9, Dhaka in Metropolitan Special Tribunal Case No.1135 of 1999 is modified to that effect. The petitioner is directed to surrender before the Tribunal to serve out the remaining period of his sentence as reduced above.

Send down the lower Courts records.

Mohammad Marzi-ul-Huq, J:

I agree.